Supreme Court, U.S.
FILED
JUL 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1819

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

G. THOMAS CESTARO,

Petitioner,

– against –

JAMES CORCORAN, as Superintendent of Insurance of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION: FIRST DEPARTMENT

PETITIONER'S REPLY

G. THOMAS CESTARO
Petitioner, Pro-Se
653 Old Country Road
Westbury, New York 11590
(516) 333-4810

DONALD J. STELLER
Of Counsel

TABLE OF CONTENTS

	Page
PETITIONER'S REPLY	1
STATEMENT OF FACTS	2
JUDICIAL PROCEEDINGS BELOW	5
ARGUMENT	
PETITIONER'S DUE PROCESS RIGHTS TO CONFRONT AND TO CROSS EXAMINE ADVERSE WITNESSES WAS ABRIDGED BY THE INCORPORATION, OVER OBJECTION, OF A TRANSCRIPT OF TESTIMONY ELICITED AT A PRIOR SUMMARY SUSPENSION HEARING WHERE PETITIONER WAS EXCLUDED UPON THE DEMAND OF THE PROSECUTING ATTORNEY. THE TESTIMONY ELICITED AT THE SUMMARY SUSPENSION HEARING, UNTESTED FOR TRUTH BY PETITIONER'S TIMELY CROSS-EXAMINATION WAS HIGHLY PREJUDICIAL AS IT ESTABLISHED AN ELEMENT OF THE STATUTORY OFFENSE FOR WHICH HE WAS CHARGED AND RESPONDENT'S DETERMINATION TO REVOKE PETITIONER'S LICENSE, PREDICATED UPON SUCH EVIDENCE, SHOULD BE REVERSED. RESPONDENT'S CONTENTION NOTWITHSTANDING, PETITIONER DID NOT WAIVE HIS DUE PROCESS RIGHT TO CONFRONT AND TO CROSS-EXAMINE WITNESSES GIVING TESTIMONY ADVERSE TO HIS INTEREST	6
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
Brookhart v. Janis, 384 U.S. 1, 3, 4, 5 (1965)	7
Glasser v. United States, 315 U.S. 60, 70-71	7
Johnson v. Zerbst, 304 U.S. 458, 464	7
Pacific Molasses Company v. Federal Trade Commission, 356 F.2d 386 (Cir. 5 1966)	7
Town of Somerset, et al. v. Montgomery County Board of Appeals, 245 Md. 52, 225 A.2d 294 ..	7, 8

No. 85-1819

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

G. THOMAS CESTARO,

Petitioner,

— against —

JAMES CORCORAN, as Superintendent of Insurance of the State of New York,

Respondent.

PETITIONER'S REPLY

G. Thomas Cestaro seeks review in this Court, by Writ of Certiorari, of a judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department (hereinafter Appellate Division) confirming the respondent's determination, after a hearing, to revoke petitioner's insurance brokers license. This brief is submitted in reply to Respondent's memorandum in opposition, dated July 3, 1986.

STATEMENT OF FACTS

The respondent herein, James Corcoran, as Superintendent of Insurance, initiated actions and caused two separate proceedings to commence, as follows: The first was a summary suspension action directed against an insurance brokerage entity known as Omnibus Brokerage Incorporated (Omnibus) and against Bruce S. Horowitz (Horowitz), an individual licensed as an insurance broker. The first action was based upon specific allegations of improper conduct employed by Omnibus and by Horowitz in insurance dealings. The second proceeding, which was to be heard at a later time, was a hearing on a Citation alleging certain misconduct by the same two aforesaid parties and also by the petitioner herein. (Appendix Pages A1-A16, annexed to Petition for a Writ of Certiorari). The first action was summary in nature. The two named parties, Omnibus and Horowitz, demanded a hearing for relief from the summary suspension order.

In *January and February of 1984* a hearing was held in response to the Omnibus-Horowitz demand. The petitioner appeared at the hearing only as a potential non-party witness for Omnibus and for Horowitz.[1] Upon the specific insistence and demand of the department's prosecuting attorney, all non-party witnesses, including the petitioner, were excluded from the hearing room.[2] The summary suspension hearing generated adverse testimony

---

[1] The fact that petitioner was not a named party and received no notice of the Summary Suspension hearing is conceded by respondent in its memorandum to this Court in opposition, where respondent states:

(footnote 3) "Although petitioner was charged in the Citation (A1-A16), also served on Horowitz and Omnibus, with knowledge of and participation in the fraudulent business practices of Omnibus, petitioner was not served with the Summary Suspension Order as to their [sic] licenses and was not a party to the summary suspension proceedings, because he was not licensed as a broker, agent or salesperson for Omnibus. * * *" (p. 2 of Respondent's memorandum in opposition)

[2] The attorney for the insurance department, upon the request of the hearing officer for her to make a statement on the record regarding the circumstances

(Footnote 2 Continued)

and substantial evidence encompassing approximately 700 pages of transcript. The petitioner herein was not called by either side as a witness in that proceeding but testimony was elicited from other witnesses that tended to implicate him adversely.

In *March and April of 1984*, (some two months later), the second proceeding, namely the Citation hearing, took place. At that time the petitioner was a named party, and over the specific objections of his attorney, the aforementioned external transcript was admitted into evidence by the hearing officer and incorporated into the new transcript. However, the hearing officer did offer to allow the petitioner to recall all prior adverse witnesses at that later time. Additionally, the hearing officer offered to permit the deferred examination of the adverse witnesses at the insurance department's expense. The hearing officer made the aforementioned offers after some two months had elapsed since the adverse testimony had been elicited. It is submitted that there was apparent substantial likelihood that the witnesses' memories were clouded by the passage of time. Additionally, a strong possibility existed that potential testimony obtained upon the deferred recall of the witnesses would be tainted as unduly influenced by extrinsic forces. The petitioner's counsel rejected the hearing officer's offers.

The hearing officer, in her findings of fact, conclusion and decision, recited that that hearings against petitioner began on January 12, 1984 and continued on January 23, 30, 31 and February 6, 7, 1984 (Page A17 of Appendix, annexed to Pet. for Cert.). The hearing officer concluded that petitioner knew or should have known of all the activities for which Horowitz and Omnibus' licenses were suspended and that he shared responsibility, if not for the acts of wrongdoing, then for failing to report such acts, as would be expected of a licensee. (A29)

---

surrounding petitioner's exclusion at the prior proceeding, stated as follows: " **At the original hearing that was scheduled, the original attorneys for the respondents indicated that anybody who might be giving testimony should be excluded, so because the summary suspension did not involve Mr. Cestaro at that time, I requested that he also remain outside, not knowing whether he would give testimony either at that time and that was agreed.**" (R. 719-720, from the Record on Appeal in the Appellate Division, comprising a transcript of proceedings before the Insurance Department.)

Petitioner submits that the hearing officer and respondent relied upon testimony elicited in the summary suspension hearing, during the petitioner's compulsory exclusion from the hearing room, to reach a determination that Horowitz and Omnibus were guilty of fraudulent practices, which caused substantial prejudice to petitioner herein. It is further submitted that due to the interrelationship between the Insurance Department's charge that Omnibus and Horowitz's engaged in fraudulent practices and the Insurance Department's charge that petitioner failed to report said fraudulent practices, the testimony elicited at the prior summary suspension proceeding pertaining to said fraudulent practices was highly relevant to the establishment of the charge against petitioner and was the predicate to the determination of petitioner's culpability. Without establishing that Horowitz and Omnibus had engaged in fraudulent practices, a charge against petitioner, alleging a failure to report such fraudulent practices, could not be initiated or maintained by the respondent. Instead of establishing the fraudulent practices of Omnibus and Horowitz in its case in chief against petitioner, the hearing officer allowed the testimony of the summary suspension hearing, elicited during petitioner's compulsory exclusion from the hearing room, and untested for truth by timely cross-examination, to be admitted in petitioner's proceeding, over the timely objection of his attorney.

It is petitioner's contention that the hearing officer's determination that he was guilty of improper practices, was based upon the strength of adverse testimonial evidence admitted during his compulsory exclusion from the hearing room, which testimony had not been tested for truth by timely and reliable cross-examination, in accordance with established federal Due Process standards. Petitioner further contends that he was substantially prejudiced when the transcript which included the aforementioned adverse testimonial evidence was incorporated into the record of the Citation hearing, which took place some two months later. It is submitted that the Superintendent's determination should be reversed for the respondent's failaure to provide petitioner with reasonable and timely Due Process protections in accordance with the United States Constitution, which

include, but are not limited to, proper notice of a hearing where adverse testimony was elicited that was later used against him.

Respondent now concedes that petitioner was entitled, under the Due Process clause of the 14th Amendment, to a fair hearing, including the right to cross-examine adverse witnesses. (Memorandum in Opposition, page 3). However, it is now the respondent's contention that petitioner waived his rights to cross-examine and consented to the admission of the contested transcript. Petitioner submits that the record is devoid of any evidence of his intention to waive or relinquish his Constitutional rights or of any consent to admit the transcript. A detailed reply to Respondent's memorandum in opposition is set forth below.

JUDICIAL PROCEEDINGS BELOW

Petitioner filed a complaint in the Supreme Court of the State of New York, New York County, seeking to review an administrative determination, after a hearing, made by respondent, as Superintendent of Insurance of the State of New York, to revoke petitioner's insurance brokers license. (Pages A17-A30 of Appendix, annexed to Pet. for Cert.) Pursuant to § 7804 (g) of the New York Civil Practice Law and Rules (CPLR), the action was transferred to the Supreme Court, Appellate Division, First Judicial Department for hearing and determination in the first instance. After considering the submission of briefs from both sides and hearing oral argument, the Appellate Division confirmed the determination of respondent, without opinion. From said determination, petitioner respectfully seeks this Court's review.

The New York State Court of Appeals denied petitioner's motion for leave to appeal on February 6, 1986. (A33) Said determination was not on the merits and accordingly, petitioner seeks this Courts review of a determination of the Appellate Division, which confirmed the decision of respondent, as Superintendent of Insurance, to revoke petitioner's insurance broker's license.[3]

---

[3] Respondent's contention notwithstanding (memorandum in opposition, page 3), that the New York State Court of Appeals rejected the Constitutional issue presented to this Court, the Court of Appeals' denial of petitioner's motion for leave to appeal was not a determination on the merits and is not an adjudication as to the issues in this case.

ARGUMENT

PETITIONER'S DUE PROCESS RIGHTS TO CONFRONT AND TO CROSS EXAMINE ADVERSE WITNESSES WAS ABRIDGED BY THE INCORPORATION, OVER OBJECTION, OF A TRANSCRIPT OF TESTIMONY ELICITED AT A PRIOR SUMMARY SUSPENSION HEARING WHERE PETITIONER WAS EXCLUDED UPON THE DEMAND OF THE PROSECUTING ATTORNEY. THE TESTIMONY ELICITED AT THE SUMMARY SUSPENSION HEARING, UNTESTED FOR TRUTH BY PETITIONER'S TIMELY CROSS-EXAMINATION WAS HIGHLY PREJUDICIAL AS IT ESTABLISHED AN ELEMENT OF THE STATUTORY OFFENSE FOR WHICH HE WAS CHARGED AND RESPONDENT'S DETERMINATION TO REVOKE PETITIONER'S LICENSE, PREDICATED UPON SUCH EVIDENCE, SHOULD BE REVERSED. RESPONDENT'S CONTENTION NOTWITHSTANDING, PETITIONER DID NOT WAIVE HIS DUE PROCESS RIGHT TO CONFRONT AND TO CROSS-EXAMINE WITNESSES GIVING TESTIMONY ADVERSE TO HIS INTEREST.

Respondent concedes that petitioner had a Due Process right, under the 14th Amendment to the United States Constitution, to confront and to cross-examine witnesses who gave testimony adverse to his interests. (Memorandum in Opposition, Page 3). It is respondent's contention that petitioner waived his Constitutional rights to cross-examine and consented to the admission of the contested transcript, as follows:

1) As noted by the hearing officer, petitioner's counsel, who actively participated in the summary suspension proceedings and were fully familiar with the evidence elicited, consented to the incorporation of the transcript of those initial proceedings into the record of the hearing on the citation to avoid the duplicative effort and expense of recalling all the witnesses with respect to Horowitz and Omnibus.

2) Petitioner failed to avail himself of the opportunity to recall the adverse witnesses as his own witnesses (at the department's expense) at the Citation hearing.

First, in response to respondent's contention that counsel for petitioner consented to later incorporation of the Summary Suspension trancript, containing evidence elicited during Petitioner's compulsory exclusion from the hearing room and untested for truth by timely cross-examination, petitioner submits that (1) such a position is untenable as petitioner was not represented by counsel at the Summary Suspension Proceeding (2) he was not a named party and had no standing in the Summary Suspension proceeding, (3) while it is conceded that the attorneys representing Horowitz and Omnibus, the two named parties in the Summary Suspension Proceeding, stipulated that the testimony adduced at the Summary Suspension Hearing would be incorporated into and made a part of their Citation hearings, petitioner was not present when this stipulation was entered into and no one was empowered to make a knowing, voluntary and intentional relinquishment or abandonment of his Constitutional rights in his absence, (4) respondent failed to show any evidence in the record which establishes that petitioner unequivocally intended to waive his right to confront and cross-examine witnesses giving testimony adverse to his cause, and (5) under such circumstances, and because waiver of a Constitutional right is not presumed, respondent failed to meet its burden of establishing waiver. Cf. *Brookhart v. Janis*, 384 U.S. 1, 3, 4, 5 (1965); *Glasser v. United States*, 315 U.S. 60, 70-71, *Johnson v. Zerbst*, 304 U.S. 458, 464.

Second, in response to respondent's contention that petitioner waived his right to confront and to cross-examine witnesses who gave testimony adverse to his cause by refusing the hearing officer's offer to allow petitioner to recall as his own witnesses (at the Department's expense) those whom he wished to question, petitioner submits that no waiver occured. The delayed alternative proferred was not the substantial equivalent of cross-examination, where the questioning immediately succeeds in time the direct examination. Cf. *Pacific Molasses Company v. Federal Trade Commission*, 356 F.2d 386 (Cir. 5 1966), *Town of Somerset*,

et al. v. Montgomery County Board of Appeals, 245 Md. 52, 225 A.2d 294. In the instant case the hearing officer's offer was made some two months after the adverse testimony had been elicited. It has been petitioner's consistent contention that recalling the adverse witnesses at that time would have been ineffective in altering the impressions that were made upon the hearing officer in observing the demeanor of the witnesses at the time of the initial hearing without their testimony withstanding a timely and reliable test for truth. [especially since Cestaro was not even a party to the Summary Suspension Hearing] As the Court of Appeals of Maryland observed in *Town of Somerset, et al. v. Montgomery County Board of Appeals*, 245 Md. 52, 225 A.2d 294:

> "The right of a party to call hostile witnesses as its own after the testimony of the adverse witness has been completed, in our opinion, is not the substantial equivalent of the right to cross-examine after the direct testimony of the witness has been concluded. The techniques of advocacy so essential to our system of justice are largely stultified when resort must be had to such a cumbersome and delayed substitute for immediate and direct cross-examination."

Here, as in *Town of Somerset*, justice was stultified by the hearing officer's offer of a delayed substitute for immediate and direct cross-examination and the respondent's determination should be vacated.

Finally, in response to respondent's contention that petitioner failed to establish prejudice resulting from the denial of his Due Process rights, petitioner submits that substantial prejudice resulted from the denial of his right to timely cross-examine adverse witnesses *against him* and to be present at all proceedings where evidence was admitted and adduced that tended to *incriminate him*. The petitioner was found guilty of an alleged knowledge of fraudulent practices perpetrated by Omnibus and/or Horowitz and of his failure to report such alleged knowledge to the Insurance Department. It follows that petitioner could not have been found guilty of knowledge and/or failure to report fraudulent practices if no fraudulent practices were shown and/or

proven. The testimony and evidence regarding fraudulent practices were primarily adduced and admitted during the Summary Suspension hearings, during which the petitioner was not present, was not represented and was not even a party. The Record of the Summary Suspension hearing shows that Omnibus and/or Horowitz were involved in fraudulent practices and/or violations of the Insurance Law. Additionally, the record of the Summary Suspension hearing shows that a business relationship existed between Omnibus, Horowitz and Cestaro. Petitioner submits that the true nature of the business relationship that was shown to the hearing officer during the Summary Suspension hearing was not defined or refined by cross-examination. Petitioner contends that in the absence of cross-examination, he was the victim of an assumption of guilt by association.

Respondent contends that petitioner can show no prejudice as the hearing officer did not rely upon the transcript of the summary suspension hearing in reaching her determination to revoke petitioner's brokers license. (Memorandum in Opposition, p. 4). In reply, petitioner submits that the proclaimed lack of reliance on the testimony and evidence adduced and admitted during the Summary Suspension Hearing is contradicted by the fact that (1) the hearing officer insisted upon incorporation of the transcript, over the strenuous objections of Petitioner's new attorney, (2) the hearing officer included in her determination a recitation of the dates of the Summary suspension hearing that she relied upon in forumulating her findings of fact, conclusion and decision. (A17-A30, annexed to Pet. for Cert.)

Upon the facts and the principles of law outlined above, petitioner's application to this Court to issue a Writ of Certiorari to the Appellate Division should be granted, with such other and further relief as this Court may deem just and proper.

CONCLUSION

Upon the facts and the principles of law outlined above, it is earnestly urged that a Writ of Certiorari issue to review a judgment of the Appellate Division, which confirmed Respondent's determination to revoke petitioner's insurance brokers license after a hearing.

Respectfully Submitted,

G. THOMAS CESTARO
Petitioner, Pro-Se
653 Old Country Road
Westbury, New York 11590
(516) 333-4810